Supreme Court, U.S.
FILED

(1)

03 186 AUG 4 2003

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

TZE-PONG "RAYMOND" KU,
Petitioner,

v.

STATE OF TENNESSEE, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ARTHUR F. KNIGHT, III
Counsel of Record

BECKER, FLEISHMAN, BROWN
& KNIGHT, P.C.
800 SOUTH GAY STREET
SUITE 600
KNOXVILLE, TN 37929
(865) 522-5057

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

45 pp

QUESTIONS PRESENTED

1. What procedural protections does the Fourteenth Amendment require be afforded to a medical student at a state owned or operated medical school who is involuntarily placed on an indefinite leave of absence for a suspected behavioral or psychological disorder.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Tze-Pong "Raymond" Ku is not a subsidiary or affiliate of a publically owned corporation. No publically owned corporation has a financial interest in the outcome.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding
and Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

I. Reasons for Granting the Petition 7

II. Review is warranted because the due process rights of a student suspended indefinitely as the result of a suspected mental disorder or condition is an important question of federal constitutional law 8

III. Review is warranted because categorization of the decision to place Petitioner on an indefinite leave of absence for a suspected mental condition as an academic decision clearly conflicts with this Court's decision in Horowitz 11

Conclusion 13

Appendix

Appendix A
Sixth Circuit Order - 5/6/03 . . . . . 1a

Appendix B
Sixth Circuit Opinion - 3/12/03 . . . . . 3a

Appendix C
District Court Memorandum Opinion - 6/7/01 . . . 18a

Appendix D
District Court Order - 6/7/01 . . . . . 25a

TABLE OF AUTHORITIES

Cases:

Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) 7-12

Goss v. Lopez, 419 U.S. 565 (1975) 7, 8

Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) 11

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 . . . . . 1, 5

Fourteenth Amendment . . . . . i, 5, 7

Supreme Court Rule 10 7

Other:

College Initiative - Campaign for America's Mental Health, (visited July 18, 2003) <http://www.nmha.org/camh/college/index.cfm> . 9

The Numbers Count: Mental Disorders in America, 2001 Nat'l Inst. Mental Health No. 01-4584 9

Webster's II New College Dictionary, 1999 12

OPINIONS BELOW

The May 6, 2003 Order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's Petitioner for Rehearing *En Banc* is reprinted at App. 1a. The March 12, 2003, Sixth Circuit Opinion is reported at 322 F.3d 431 (2003) and is reprinted at App. 3a. The June 7, 2001, Memorandum Opinion and Order of the United States District Court for the Eastern District of Tennessee are reprinted at App. 18a, 25a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued an Order denying Petitioner's Petition for Rehearing *En Banc* May 6, 2003. This Petition for Certiorari is timely in that Petitioner has filed it within ninety (90) days of May 6, 2003. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case was brought pursuant to 42 U.S.C. § 1983 to redress a violation of Petitioner's federal constitutional rights.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act

or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Tze-Pong "Raymond" Ku matriculated into East Tennessee State University's James H. Quillen College of Medicine in the fall of 1996. Ku's first year of medical school was uneventful. He passed all of his courses and was promoted to the second year study with the rest of his class.

During the spring semester of his second year, Ku was diagnosed with a hernia and had to have surgery. Ku informed his professors of the procedure and missed two weeks of class because of the surgery. Although Ku failed two tests after the surgery, he addressed the matter with the professors involved. In any event, Ku finished the second semester passing all of his classes and he was promoted to the third year curriculum.

All medical students at the College of Medicine are requires to take the United States Medical License Examination ("USMLE") Step I examination after the completion of the second year. According to the policies of the medical college, students are given three opportunities to pass the Step I examination. The test must be passed before the beginning of the student's fourth, or senior, year of medical school. According to the college's policies, students failing to pass the exam following the second year can still enroll in and complete the third year clerkships.

Step II of the USMLE examination must be passed in order to graduate.

Like his classmates, Ku took the Step I examination during the summer of 1998 following his second year. He then began his third year of medical school. Third year consists of clerkships involving various specialities of medicine and each clerkship lasts eight weeks.

Ku's first clerkship was internal medicine. He completed the course, received a grade of "B", and received favorable evaluations from his instructors. However, approximately one week prior to the end of the internal medicine rotation, Ku learned that he had not passed the Step I examination on his first attempt. Other students also did not pass the summer administration of the test, but again, according to the college's express, written policies, Ku and the other students had two more attempts to satisfactorily complete the exam prior to the beginning of the fourth year. Accordingly, Ku started his next clinical rotation, surgery.

When Ku was three-fourths (3/4) of the way through his surgery clerkship, he was called to a meeting on September 28, 1998 with Dr. Daniel Wooten, Executive Associate Dean, Academic and Faculty Affairs. Dean Wooten told Ku he was being place on an indefinite leave of absence. Although Wooten commented on Ku's USMLE result, he informed Ku that the faculty felt he had behavioral problems and needed a psychological evaluation. No further explanation was provided for the leave of absence and no psychological evaluation was arranged. Ku did learn that the decision to place him on leave occurred in a Student Promotions

Committee meeting September 24, 1998. Ku was not present nor was he informed of the meeting.[1]

Ku had never been told previously by any member of the administration, or the faculty or staff that he was thought to have a behavioral and/or psychological problem. Even after being place on leave, Ku was given no specific information as to what condition he was suspected to have, who in the administration or faculty suspected it, or the basis for the speculation.

In any event, Ku appealed the decision. Ku was allowed to speak before the Student Promotions Committee in a meeting on October 28, 1998, but without knowing what specific issues needed to be addressed. The Student Promotions Committee denied his appeal and Ku and his mother met with the Dean of the College of Medicine, Ronald Franks, M.D., on November 17, 1998. Dean Franks, however, refused to set aside the decision to place Ku on leave of absence and so did East Tennessee University's President, Paul Stanton, M.D. Both Franks and Stanton cited the suspicion that Ku had psychological problems as the reason.

On January 19, 1999, Dean Franks sent Ku a letter outlining a plan of remediation which Ku would have to follow and complete in order to be considered for return to the College of Medicine. It included psychological testing and monthly meetings with Dean Franks. Ku was tested by two psychologists but no psychological disorders, problems,

---

[1] The other students who failed the summer administration of the Step I exam remained in school and took the test again in October of 1998.

or conditions were diagnosed. One of the psychologists opined that Ku's purported problems, if they existed at all, would be better addressed in the medical school context.

After many requests to return to his medical studies, Ku received a letter from Dean Wooten on October 8, 1999, detailing the conditions of any return. The letter read in pertinent part:

> The Committee recommends that you be allowed to return to the sophomore classes beginning 10/20/1999, with the following stringent stipulations: (1) you must attend all sophomore classes; (2) you must always be on time for class; (3) you will be given a battery of oral exams at the end of the fall semester 1999 and spring semester 2000 which you must pass; (4) a structured evaluation of your performance will be conducted at the conclusion of each semester prior to your continuing in school; and (5) communication skills.
>
> Failure to achieve a satisfactory (passing) evaluation at the end of the fall or spring semester will result in a recommendation that you be dropped in enrollment at the James H. Quillen College of Medicine.

None of the conditions outlined in Dean Wootens letter comported with or could be found anywhere in the College of Medicine's policies and procedures.

The Plaintiff filed suit January 10, 2000, pursuant to 42 U.S.C. § 1983 alleging the violation of his Fourteenth Amendment due process rights by the College of Medicine. The State of Tennessee file a Motion to Dismiss and it was denied. An Answer was filed and discovery was taken and

completed. The State then filed a Motion for Summary Judgment and Ku filed a Response. The United States District Court for the Eastern District of Tennessee denied the State's Motion for Summary Judgment and on the undisputed facts, entered judgment for Ku.

The court ordered:

> Mr. Ku be allowed to re-enter medical school; resume his third year clearkships; and retry the USMLE Step I exam when he feels ready to do so, with the understanding that it must be passed before he can begin his fourth year curriculum.

In its opinion, the district court concluded that Ku's suspension "was not premised upon his academic record". The district court also concluded it was "not clear" that Ku's suspension was disciplinary because no evidence existed that Ku had violated any of the school's rules and regulations, but rather the decision to place him on indefinite leave of absence was grounded on the college's concerns that Ku suffered from "psychological problems." As a result, the district court ruled that "due process would require some prior notice and opportunity to be heard, prior to any suspension, as well as an opportunity for a psychological evaluation before the final decision were to be reached."

The State of Tennessee appealed to the United States Court of Appeals for the Sixth Circuit. On March 12, 2003, the Sixth Circuit reversed the district court, classified the leave of absence as being premised on academic reasons, and entered judgment for the State of Tennessee. Ku filed a Petition for Rehearing En Banc on March 27, 2003. The Petition was denied May 6, 2003.

This Petition for a Writ of Certiorari followed.

I. Reasons for granting the Petition.

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court . . ." Another consideration is that a United States Court of Appeals "has decided important questions of federal in a way that conflicts with relevant decisions of this Court."

Both of these considerations are present in this case. The Court has addressed the procedural protections the Fourteenth Amendment affords a student at a public school facing the removal of enrollment in Goss v. Lopez, 419 U.S. 565 (1975), and Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978). Goss decided what due process was required to be provided to a student suspended for 10 days or less for disciplinary reasons. On the other hand, in Horowitz, the Court explored the federal procedural due process rights required when a student is dismissed for the failure to meet academic standards. The Court has not outlined the due process rights of a student suspended for a longer period than 10 days or dismissed from enrollment for disciplinary reasons. In addition, the Court has not addressed what procedural protections due process affords a student suspended or dismissed from enrollment as a result of a suspected behavioral or psychological disorder.

Petitioner submits that the due process rights of a student suspended indefinitely for a suspected mental disorder is an important question of federal constitutional law as millions of

Americans are afflicted with some type of mental condition. Moreover, the court of appeals' decision that Petitioner's suspected mental condition falls under the ambit of "academic" for due process purposes conflicts with this Court's decision in Horowitz because the mere presence of a mental disorder or condition is wholly distinct from inadequate academic performance.

The Court's review is warranted for both of these reasons.

II. Review is warranted because the due process rights of a student suspended indefinitely as the result of a suspected mental disorder or condition is an important question of federal constitutional law.

The Court's decisions addressing what process is due a student suspended or dismissed from a public school turn on whether the suspension or dismissal is disciplinary in nature or based upon academic performance. In Goss v. Lopez, 419 U.S. 565 (1975), the Court set the standard for procedural due process owed to students facing short-term school suspensions:

> Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

Goss, 419 U.S. at 581. The Goss explained, however, that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Id at 584. The Court has not answered the

question of what, if any, additional process is required for a long term suspension or expulsion.

The federal procedural due process rights afforded students in an academic setting were explored in Board of Curators of the Univ. of Mo. v. Horowitz, 98 S.Ct. 948 (1978). In Horowitz, the Court held that a medical student dismissed for failing to meet academic standards comported with due process that the student that has been fully informed of faculty dissatisfaction with his or her performance, and if the decision to dismiss the student was "careful and deliberate". Horowitz, 435 U.S. at p. 85. In Horowitz, however, the court noted that if other factors removed the case from the "typical instance" of academic dismissal, greater procedural protections may be warranted. Id at p. 89 n. 5.

The important question of federal constitutional law presented by this case has never been addressed by the Court. In this country, millions of Americans are afflicted with a diagnosable mental disorder. Reputable sources estimate that 22.1% of Americans ages 18 and over, or 44.3 million adults, suffer from a diagnosable mental disorder in a given year. *The Numbers Count: Mental Disorders in America*, 2001 Nat'l Inst. Mental Health No. 01-4584. According to the National Mental Health Association, ten (10%) percent of college students have been diagnosed with depression including 13% of collegiate women. *College Initiative - Campaign for America's Mental Health*, (visited July 18, 2003) <http://www.nmha.org/camh/college/index.cfm>. Therefore, the issue of what process is due to an individual deprived by the state of property or liberty on the basis of the mere presence or suspected presence of a mental disorder or condition is a serious matter potentially affecting millions of citizens.

Many, if not the great majority, of individuals suffering from mental disorders function well in society including attending school and performing various occupations. Assuming a state school or employer, these citizens are at risk of being deprived of property or liberty as a result of a mental disorder despite the fact that they perform well in their respective endeavors. Accordingly, when and under what circumstances these persons' property rights can be taken and what process is due to those individuals are critically important questions concerning the functioning of our society. As the district court recognized, the deprivation of property or liberty based upon the mere presence of a mental disorder or suspected mental disorder represents an important protectable interest which requires at the very least notice and opportunity to be heard prior to any suspension as well as the opportunity for a complete psychiatric evaluation before any action is taken.

Even if the college of medicine's decision to place Ku on an indefinite leave of absence could be construed as a hybrid of academic and psychological concerns, an important question of federal constitutional law is still presented. The mere fact that an actual or perceived mental disorder played any part in a decision to dismiss or suspend a student necessitates further procedures to safeguard federally protected interests. As the Horowitz court indicated, once the issue becomes more than just a determination as to whether a student has met academic performance standards, more protection is needed. The Horowitz decision was grounded in the court's willingness to defer the evaluation of academic performance to educators. If the mental health of a student is part of the reason for the adverse action, that deference is no longer justified. At that point, at the very least, the judgment of other professionals is needed to assure due process. Accordingly, it is submitted that even in a hybrid situation,

clear and specific notice, an opportunity to be heard, and evaluation by a professional should be the standard prior to any decision.

III. Review is warranted because categorization of the decision to place Petitioner on an indefinite leave of absence for a suspected mental condition as an academic decision clearly conflicts with this Court's decision in Horowitz.

By classifying the mere presence of a mental disorder as "academic", the Court of Appeals misapplied the Court's decision in Horowitz. The Court's decision in Horowitz clearly concerned the failure to meet academic standards. Nowhere in the Horowitz decision did the Court state or allude to the treatment of students with or suspected of having psychological problems. In fact, citing Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975), the Horowitz court recognized that if other factors are involved, the case is removed from a "typical instance" of academic dismissal and greater procedural protections must be provided. See Horowitz, 435 U.S. at p. 89 n. 5.

Not only did the court of appeals ignore the record, and the district court's decision, it labeled the college of medicine's decision concerning Ku's psychological well being "academic" for due process purposes. That is in clear conflict with Horowitz. Horowitz simply dealt with the failure to meed academic standards. It is submitted that that is wholly distinct from the issue of whether a student is suffering from a mental disorder or condition. Whether a student is meeting academic performance standards is certainly within the purview of educators, but the presence or absence of an illness is not.

The court of appeals attempted to bypass this issue and the district court's determination by citing to the following passage in the student handbook:

> Evaluation of academic performance may include (but is not necessarily limited to) measuring the student's knowledge, testing how the student applies knowledge to specific problems, evaluation of the judgement a student employs in solving problems and assessing the quality of the student's psychomotor skills, ethical behavior and interpersonal relationships with medical colleagues, patients, and patients' families.

The court of appeals' opinion does not specify but based on the record and the court of appeals' reasoning, this passage was obviously cited for the phrase "student's psychomotor skills." This is because Ku has passed all of his first and second year courses and had received stellar evaluations during his third year clerkships which is designed to measure ethical behavior and interpersonal relationships with medical colleagues, patients, and patients' families. The word "psychomotor", however, is not encompassed within any definition of, does not refer to, or is not synonymous with mental disorder. Webster's defines psychomotor as "of or relating to muscular activity associated with mental processes". Webster's II New College Dictionary, 1999. In other words, skills such as hand-eye coordination. Accordingly, this passage provides no support to the court of appeals' rationale that Ku's leave of absence was academic. Instead, it is clear that the court of appeals' opinion conflicts with the court's decision in Horowitz, and accordingly, the petition for writ of certiorari should be granted for this additional reason.

CONCLUSION

For each and all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Arthur F. Knight, III (BPR #016178)
BECKER, FLEISHMAN, BROWN & KNIGHT, P.C.
800 South Gay Street, Suite 600
Knoxville, TN 37929
(865) 522-5057

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 01-5886/01-6150

[Filed May 6, 2003]

TZE-PONG "RAYMOND" KU, Plaintiff-Appellee,

v.

STATE OF TENNESSEE, Defendant-Appellant.

JUDGES: Before MARTIN, Chief Judge; MERRITT and LAY,* Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-5886/01-6150

[Argued January 31, 2003,
Decided and Filed March 12, 2003]

TZE-PONG "RAYMOND" KU, Plaintiff-Appellee,

v.

STATE OF TENNESSEE, Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville
No. 00-00010
Thomas G. Hull, District Judge

JUDGES: Before MARTIN, Chief Circuit Judge; MERRITT and LAY, Circuit Judges.*

* The Honorable Donald P. Lay, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINIONBY: MERRITT

OPINION

MERRITT, Circuit Judge. In this § 1983 action, plaintiff Tze-Pong "Raymond" Ku claims that the State of Tennessee deprived him of his right to procedural due process when it placed him on leave of absence from his third year of studies at East Tennessee State University's James H. Quillen College of Medicine. The district court denied Tennessee's motion for summary judgment and instead granted summary judgment to the plaintiff. As remedy, the district court ordered Tennessee to readmit the plaintiff and permit him to resume his third-year rotations at the University and take the United States Medical License Examination Step 1 when he feels ready, as long as he passes it before beginning his fourth year. Tennessee appeals the district court's order on the merits and also on the ground that the state is protected by sovereign immunity under the *Eleventh Amendment*, even though the state did not raise the issue until the district court decided the case on the merits. We agree with the District Court on the *Eleventh Amendment* question, but we conclude that the College afforded Ku with more than adequate process in rendering its decision regarding his academic status and therefore reverse.

I.

Tennessee raised the defense of *Eleventh Amendment* immunity for the first time before the district court in its motion for a stay pending appeal of the district court's order. Before that time, Tennessee appeared without objection to the district court's jurisdiction over this federal question and defended the suit on the merits, engaging in substantial discovery and filing a motion for summary judgment. It was

only after a final adverse ruling by the district court that Tennessee raised the *Eleventh Amendment* immunity defense. In considering the motion for stay, the district court ruled that Tennessee had waived its *Eleventh Amendment* immunity by appearing and defending the case on the merits.

The *Eleventh Amendment* provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." By its decisions in two recent cases, one in 1998 and the other in 2002, it appears that the Supreme Court is moving in the direction of concluding that, in cases where the district court otherwise has original jurisdiction over the matter, the *Eleventh Amendment* immunity defense should be treated in the same way courts have traditionally treated personal jurisdiction rather than as a matter of subject matter jurisdiction.

In *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 141 L. Ed. 2d 364, 118 S. Ct. 2047 (1998), the Court addressed the question whether the presence of one federal claim barred by the *Eleventh Amendment* in an otherwise removable case destroys removal jurisdiction over the entire case. In holding that removal jurisdiction over the remaining claims is not destroyed, the Court distinguished between *Eleventh Amendment* immunity as a defense and the absence of original jurisdiction as a defense. 524 U.S. 381 at 388-89. A federal court's original jurisdiction is created by statute enacted under Article III, which functions as a fundamental limit on federal power. Because it is a fundamental "subject matter" limitation on federal judicial power, a defect in a federal court's original jurisdiction need

not be asserted by any party, cannot be waived by any party, and must be raised by a Court *sua sponte* when noticed. *Id.* In stark contrast to this concept of subject matter jurisdiction, "the *Eleventh Amendment* grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it." *Id.* (citations omitted).

In a concurring opinion, Justice Kennedy "observed that we have neither reached nor considered the argument that, by giving its express consent to removal of the case from state court, Wisconsin waived its *Eleventh Amendment* immunity." 524 U.S. 381 at 393 (Kennedy, J., concurring). Justice Kennedy recommended that the question be considered in a later case and proceeded to lay out his rationale for finding waiver by removal. He first described the Court's inconsistent *Eleventh Amendment* jurisprudence regarding waiver as a "departure from the usual rules of waiver stemming from the hybrid nature of the jurisdictional bar erected by the *Eleventh Amendment*." 524 U.S. 381 at 394 (Kennedy, J., concurring). On the one hand, "permitting the immunity to be raised at any stage of the proceedings . . . is more consistent with regarding the *Eleventh Amendment* as a limit on the federal court's subject matter jurisdiction." *Id.* (Kennedy J., concurring). On the other, "the immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*." *See Id.* (Kennedy, J., concurring). The unfair result of the "hybrid nature" of the waiver rule, Justice Kennedy noted, is that "in permitting the belated assertion of the *Eleventh Amendment* bar, we allow States to proceed to judgment without facing any real risk of adverse consequences." *Id. at*

394 (Kennedy, J., concurring). Justice Kennedy offered a broad suggestion to eliminate this unfairness and inconsistency in the future:

> The Court could eliminate the unfairness by modifying our *Eleventh Amendment* jurisprudence to make it more consistent with our practice regarding personal jurisdiction. Under a rule inferring waiver from the failure to raise the objection at the outset of the proceedings, States would be prevented from gaining an unfair advantage.

524 U.S. 381 at 395 (Kennedy, J., concurring). Recognizing that such a rule would constitute a "substantial revision" of the Court's waiver jurisprudence in order to find waiver by removal, Justice Kennedy offered the narrower rule that removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the defense under the principle established by the Supreme Court in *Clark v. Barnard*, 108 U.S. 436, 447-48, 27 L. Ed. 780, 2 S. Ct. 878 (1883) (holding that when a State voluntarily intervenes in a federal court action to assert its own claim, its actions constitute a waiver of the *Eleventh Amendment* immunity); *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273, 284, 50 L. Ed. 477, 26 S. Ct. 252 (1906) ("Where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the *Eleventh Amendment.*"); and *Gardner v. New Jersey*, 329 U.S. 565, 574, 91 L. Ed. 504, 67 S. Ct. 467 (1947) (finding waiver of the *Eleventh Amendment* when a State voluntarily appeared in bankruptcy court to file a claim against a common

fund). *Schact*, 524 U.S. 381 at 395-96 (Kennedy, J. concurring).

Two years later in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002), the Supreme Court adopted Justice Kennedy's reasoning regarding removal and held that a State that was initially brought involuntarily into a case as a defendant in state court on both state and federal claims, but then voluntarily removed the case to federal court, may not turn around and invoke the *Eleventh Amendment* as a defense to suit in federal court. The Court explained that

> an interpretation of the *Eleventh Amendment* that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of "immunity to achieve litigation advantages.

122 S. Ct. 1640 at 1644. Thus, the search for a "clear indication" of a State's intent to waive in the litigation context "must focus on the litigation act the State takes that creates the waiver." *Id.* By taking the litigation act of voluntarily agreeing to remove the case to federal court, "[the State] voluntarily invoked the federal court's jurisdiction." *Id.* Nor could the State, through its attorney general, invoke the federal court's jurisdiction and then turn around and claim that the attorney general lacked statutory authority to waive the State's immunity in federal court, as the Court had held permissible in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 469, 89 L. Ed. 389, 65 S. Ct. 347 (1945)

(permitting a State to regain *Eleventh Amendment* immunity by showing the attorney general's lack of authority to waive even after it had litigated a case brought against it in federal court). Citing the problems of "inconsistency and unfairness that a contrary rule of law would create," the Court overruled *Ford* insofar as it might otherwise apply to the affirmative litigation action of voluntary removal. In sum, "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise valid objection to litigation of a matter (here of state law) in a federal forum." *Lapides*, 122 S. Ct. 1640 at 1646.

Although it is clear that the Court in *Lapides* adopted Justice Kennedy's rationale in *Schacht* regarding voluntary removal, it did not go so far as either to accept or reject his broader suggestion to treat the *Eleventh Amendment* immunity defense as one, like the defense of lack of personal jurisdiction, that can be permanently waived when a State fails to raise the objection at the outset of proceedings. Nevertheless, by creating a clear rule of waiver by removal, the Supreme Court has unequivocally rejected the view that, in cases over which the federal court otherwise has original jurisdiction, the additional "jurisdictional bar" erected by the *Eleventh Amendment* should be treated as a matter of "subject matter" jurisdiction rather than "personal" jurisdiction. To say that voluntary removal constitutes a clear waiver is inconsistent with treating *Eleventh Amendment* immunity as a matter of subject matter jurisdiction. Instead, the rule is consistent only with the view that the immunity defense in cases otherwise falling within a federal court's original jurisdiction should be treated like the defense of lack of personal jurisdiction. This rule is a strong indication that the Supreme Court will adopt Justice Kennedy's broader

suggestion to "eliminate the unfairness" and inconsistency by making the *Eleventh Amendment* waiver rule "consistent with [the Court's] practice regarding personal jurisdiction." *Schacht*, 524 U.S. 381 at 395. Otherwise, the confusion regarding the proper analysis under any given set of facts will continue to lead to unfair and inconsistent results.

Here, Tennessee was initially brought in involuntarily as a defendant in a case in which the plaintiff, also a citizen of Tennessee, seeks injunctive relief for an alleged violation of 42 U.S.C. § 1983. Instead of asserting its *Eleventh Amendment* immunity defense, Tennessee engaged in extensive discovery and then invited the district court to enter judgment on the merits. It was only after judgment was adverse to the State that it revealed that it had its fingers crossed behind its metaphorical back the whole time. In our view, this type of clear litigation conduct creates the same kind of "inconsistency and unfairness" the Supreme Court was concerned with in *Lapides*. Following the rationale of Justice Kennedy in *Shacht* and the only consistent view of the line of authority endorsed in *Lapides*, we hold that appearing without objection and defending on the merits in a case over which the district court otherwise has original jurisdiction is a form of voluntary invocation of the federal court's jurisdiction that is sufficient to a waive a State's defense of *Eleventh Amendment* immunity. Accordingly, Tennessee may not now avail itself of the defense.

II.

Turning to the merits, we will assume without deciding that Raymond Ku has a constitutionally protectible property interest in continuing his medical studies under Tennessee

law. *See State ex rel. Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822, 826 (Tenn. 1942); *see also Stevens v. Hunt*, 646 F.2d 1168, 1169 (6th Cir. 1981) (citing *Sherman* for the proposition that a student's interest in continuing medical school is a "qualified property interest" under Tennessee law). Next, we address Ku's claim that the procedures used by the College to place him on leave of absence and then to readmit him to the College subject to certain conditions were constitutionally inadequate.

In the spring of his second year at the College, Ku came to the attention of the Student Promotion Committee because he was failing two courses. Ku met with Dr. Daniel Wooten, Executive Associate Dean for Academic and Faculty Affairs at the College, who expressed dissatisfaction with Ku's failing grades and certain other "unprofessional" conduct. At the meeting, Dr. Wooten "promised that he would kick [Ku] out if [he didn't] shape up." (Ku Dep., J.A. at 325.) Ku eventually passed the courses, finishing his second year with only marginal overall success. Over the summer, Ku failed the USMLE Step 1 exam. In the fall of his third year, one of Ku's clinical professors provided a negative report to the Committee regarding Ku's lack of medical and scientific knowledge, his inability to process and apply what knowledge he did have, and his inability to interact with others in a basic professional manner. Taking this and his past performance into consideration, as well as the possible risk to patients in the clinical setting, the Committee notified Ku that it recommended that he be placed on immediate leave of absence. Dr. Wooten accepted the recommendation.

After an appeals hearing, the Committee affirmed its earlier decision. The decision was subsequently affirmed by

the Dean of the College and the President of the University. During and after the appeals process, Ku was allowed to complete his psychiatry rotation. While on leave of absence, Ku met monthly with the Dean to monitor his progress in addressing his deficiencies. The next fall, the Committee determined that Ku should be readmitted, but only on the condition that he repeat the second year medical school curriculum by attending all classes and passing oral exams at the end of each semester. The Committee would then determine his readiness to sit for the Step 1 exam and resume his clinical rotations.

We agree with Ku that the record does not demonstrate any disciplinary wrongdoing on Ku's part. Nevertheless, there can also be no doubt that in the context of medical school, academic evaluations are not limited to consideration of raw grades or other objective criteria. *See Board of Curators of the Univ. of Mich. v. Horowitz*, 435 U.S. 78, 89-90, 55 L. Ed. 2d 124, 98 S. Ct. 948 (1978). Despite the defendant's arguments and the district court's apparent determination that the College's decision to place Ku on leave of absence was neither an academic decision nor a disciplinary decision, we conclude that the decision was an academic one. The Student Handbook, upon which Ku relies as evidence of his constitutionally protectible property interest, makes clear that

> evaluation of academic performance may include (but is not necessarily limited to) measuring the student's knowledge, testing how the student applies such knowledge to specific problems, evaluation of the judgement a student employs in solving problems and assessing the quality of the student's psychomotor skills, ethical behavior and interpersonal relationships

> with medical colleagues, patients and patient's families.

(Student Handbook § IX.F, J.A. at 157.)

In the case of an academic dismissal or suspension from a state educational institution, when the student has been fully informed of the faculty's dissatisfaction with the student's academic progress and when the decision to dismiss was careful and deliberate, the *Fourteenth Amendment's* procedural due process requirement has been met. *See Horowitz*, 435 U.S. 78 at 85-86. No formal hearing is required for academic decisions because such academic decisions "require[] an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." 435 U.S. 78 at 91.

Although Ku maintains that the decision "came out of the blue," the record indicates that he knew of his precarious status with the faculty and was fully informed of the Committee's recommendation by letter, which indicated that the Committee based its decision on Ku's failure to pass the Step 1 exam (a fact known to Ku) and Ku's continued difficulty interacting with faculty and peers. The Student Handbook clearly indicates that the Committee is authorized to consider USMLE Step 1 test scores along with the student's entire record when making recommendations related to an individual student's academic performance. (*Id.* § VIII, J.A. at 155.) The Committee is further authorized to recommend that a student be placed on leave of absence if, in the judgement of the Committee, the student is capable of completing the degree requirements if the student's problems

are resolved. If the student disagrees, the student is afforded the opportunity to be heard before the Committee, at which time the Committee will consider "evidence of a student's performance and/or professional behavior and those factors applying directly to the student's ability to perform." A student dissatisfied with the Committee's recommendation or final action may directly appeal the decision to the dean. Finally, the Committee is empowered to formulate a remedial program, as well as take "any other action deemed appropriate for the individual student."

Ku was given--and he took--every opportunity to appeal the decision to the highest authorities at the College, during which time he was permitted to finish his psychiatry rotation. Ku met monthly with the Dean over a period of several months so they could together evaluate Ku's deficiencies and develop and implement a plan for dealing with the professional and academic rigors of medical school and studying for the Step 1 exam. Every indication is that Ku was given particularized professional attention by faculty members at all levels in an effort to protect patients while helping Ku improve his chances of success in medical school and as a medical doctor.

Having substantially, if not scrupulously, followed the College's procedures outlined in the Student Handbook in placing Ku on a leave of absence and then permitting him to reenter the curriculum subject to extensive remediation, the College clearly afforded Ku more than adequate process under *Horowitz*, which holds that no more formal process is required for academic dismissals or suspensions than that the student is made aware of the faculty's dissatisfaction with his or her progress and the final decision was careful and

deliberate. 435 U.S. 78 at 85. Here, the Committee's recommendation and action were based on experienced faculty observation of Ku's classroom, test, and clinical performance as well as their academic judgment that a structured leave of absence would be the best course of action to improve his professional interactive skills and ensure his success in obtaining his medical degree within the prescribed time limits. By any account, the decision, reconsideration, and appeals were handled carefully, deliberately, and reasonably. We find that the procedures used throughout were sufficient under the Due Process clause of the *Fourteenth Amendment* and that Ku is not entitled to judgment as a matter of law.

The district court also denied Tennessee's motion for summary judgment. Even viewing the facts in the light most favorable to the plaintiff and drawing all reasonable inferences in his favor, we conclude that the evidence simply does not support Ku's otherwise unsubstantiated assertion that the Committee's decision "came out of the blue." In fact, his own deposition testimony indicates that he knew at least as early as his meeting with Dr. Wooten in April 1998 that he was on thin ice with the Committee, the faculty and his peers. On September 13, 1998, Dr. Hooks stated in her evaluation that Ku had a problem with his ability to focus and gave him a marginally average grade for his surgery rotation under her supervision. Moreover, as already noted, the College Handbook makes clear that the Committee reviews more than just grades or the fact that a student has a passing average. Ku was informed of the Committee's reasons for recommending a leave of absence by letter and was further given every opportunity to contest those reasons at the hearing. In sum, the undisputed facts, even accepting as true Ku's

misapprehension of the pervasive faculty perception of his problems at the College, establish that Tennessee is entitled to judgment as a matter of law on Ku's procedural due process claim.

Ku also challenges the College's action as a denial of his right to substantive due process. When reviewing the substance of academic decisions, courts "should show great respect for the faculty's professional judgment" and "may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985). "University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." 474 U.S. 214 at 225 n.11 (quoting *Horowitz*, 435 U.S. 78 at 96 n.6 (1978) (Powell, J., concurring)).

Ku has not presented a shred of evidence that the College's actions constitute a substantial departure from accepted academic norms or were otherwise taken in bad faith. In fact, the unrefuted evidence in this case demonstrates that the faculty decisions culminating in the actions complained of were the result of focused professional judgment and careful deliberation during and after many months of observing and interacting with the plaintiff both in and out of the degree program. We find that the College's decision to remove Ku from third-year clinical rotations and require him to follow a particularized program of remediation before being allowed to reenter the third-year program was in no way arbitrary or capricious.

III.

Because we find that Tennessee did not violate Ku's due process rights as a matter of law, we REVERSE the judgment of the district court and REMAND this case for entry of judgment in favor of Tennessee.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

NO. 2:00-CV-10

[June 7, 2001]

TZE-PONG "RAYMOND" KU)
)
v.)
)
STATE OF TENNESSEE)
)

MEMORANDUM OPINION

This is a civil rights action, 42 U.S.C. § 1983, in which plaintiff Tze-Pong "Raymond" Ku charges the East Tennessee State University's James H. Quillen College of Medicine (ETSU) with violations of his due process rights. The case is now before the Court on motion of the defendant State of Tennessee for summary judgment. Rule 56(b), Federal Rules of Civil Procedure. [Doc. 33].

Mr. Ku, a naturalized citizen of Chinese origin, enrolled as a medical student at ETSU in the fall of 1996. He passed his first and second year course work and was permitted to begin his third year clinical rotations but did not pass the USMLE Step 1 examination. All ETSU medical students are

required to pass this examination prior to entering their fourth year of studies. Typically, they are provided three opportunities to pass the test. Intending to retake the examination when it was given again in October of 1998, Mr. Ku began his clinical clerkship rotations in the summer of 1998. However, without prior notice, in September of 1998, he was pulled from all of his rotations and was required to withdraw from medical school. After appealing his suspension, he was given a list of conditions he must satisfy in order to return to his medical studies and retake the USMLE Step 1 examination. In this lawsuit, he claims that the requirements placed upon him represent a gross departure from ETSU's written policies and procedures; that no similarly situated student was treated in this manner; and that the University's arbitrary and capricious handling of his academic situation constitutes a violation of his due process rights. Among other things, although he had already passed all of his second year courses, Mr. Ku was required to repeat and pass by oral exams all of the same second year medical classes. ETSU has admitted that no other student in the last ten years has been forced to retake all sophomore classes already passed after having failed the USMLE Step 1 examination.

In moving for summary judgment, the State offers proof that Mr. Ku was pulled from his clinical rotations because his poor communication skills and social interactions made him unsuitable for direct patient care and that he was required to, in effect, repeat his sophomore year classes because his score on the USMLE Step 1 exam was so extremely low (in the bottom 2 % of all students taking the exam nationwide) that they did not believe he would be able to pass it upon a second or third try without a complete review of the academic

material. Finally, they show that they had good reason to believe that Mr. Ku's poor performance was based, at least in part, on psychological problems or learning disabilities which needed to be addressed before he could successfully resume his education.

The evidence presented by the State suggests that, in fact, Mr. Ku may have had emotional problems which interfered with his ability to master the course work and to interact appropriately with his peers and his faculty. It may have been an excellent idea that he repeat all of his second year courses before retaking the USMLE Step 1 exam and that he undergo the psychological evaluations and counseling also required of him. The Court is fully prepared to accept that the University was attempting to act in Mr. Ku's best interests in the hope that he would ultimately succeed as a medical student. However, the question before the Court is whether or not ETSU violated Mr. Ku's due process rights in the way it handled his situation.

As a matter of Tennessee law, medical students do possess a "qualified property right" to their medical education and are not to be dismissed or suspended or otherwise deprived of this right without notice and a fair hearing. *Sherman v. Hyman*, 171 S.W.2d 822, 826 (Tenn. 1942).

It would appear that, after passing his second year's course work, Mr. Ku began his clinical rotations. He passed his first clinical clerkship (internal medicine) with a B. Although, near the end of this clerkship, he learned that he had failed the USMLE Step 1 exam, he was allowed to proceed into his surgery rotation, supervised by Dr. Mary Hooks. Dr. Hooks was concerned about his limited medical

knowledge and his ability to interact with others in a professional manner.

She called these difficulties to the attention of the Student Promotions Committee which, by then, also had knowledge of Mr. Ku's USMLE Step 1 exam score, The committee re-evaluated his situation and determined that he should be pulled from his clerkship and placed on immediate leave of absence. Mr. Ku was notified by letter of September 25, 1998, that the Committee had recommended that he withdraw from his present course work and be placed on leave of absence. He was directed to work with Associate Dean for Academic Affairs, Daniel Wooten, to develop a plan to address his deficiencies, both academic and behavioral. A follow up letter from Dean Wooten, dated September 29, 1998, advised Mr. Ku that he would be placed on administrative leave for the remainder of the 1998-1999 academic year, effective immediately. Dean Wooten further advised Mr. Ku that the University's administration would work with him to formulate a plan for his improvement and recommended that he undergo evaluative testing "to identify and address any cognitive and/or behavioral areas of weakness that may be impacting your performance as a medical student." Mr. Ku's continuation in the junior year clerkships was made contingent upon his passing of the USMLE Step 1 examination.

These letters came, essentially, "out of the blue" with no prior hearing or request for prior psychological evaluation. Neither letter advised Mr. Ku of any right to appeal. However, based upon the student handbook, he did appeal by letter of October 14, 1998, and a post-deprivation hearing was

held before the Student Promotions Committee on October 27, 1998.

The Committee voted to stand by its original decision to suspend Mr. Ku who then appealed to Dean Ronald Franks. Dr. Franks, after reviewing Mr. Ku's student records, the Committee materials, and various faculty evaluations, concurred with the Committee. Mr. Ku then appealed to University President Paul Stanton. Dr. Stanton affirmed the Committee's decision. Dean Franks then sent Mr. Ku a letter outlining the course of action he must follow if he were to be allowed to resume his medical studies, including psychological testing and counseling, and monthly meetings with Dean Franks so that his progress could be monitored.

The State argues that, pursuant to the teachings of *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), disciplinary dismissals or suspensions from educational institutions require prior notice of the disciplinary reasons and an opportunity for the student to be heard, but suspensions predicated on academic performance entail a much less stringent due process standard -- no more than an informal give and take between the student and the administration. It assumes that the less stringent due process standard required by academic suspensions applies to the facts of this case.

However, Mr. Ku passed his first and second year courses and passed his first clinical rotation and had not even completed his second clinical rotation when the Committee determined that he should be suspended. Mr. Ku's only academic failure was the USMLE Step 1 examination. There appears to be no dispute that, typically, a third year medical

student who fails that exam for the first time is permitted to remain in school and try it two more times. The only sanction would be that the student could not proceed to the fourth year of medical school until he had passed the exam. Based on this, the Court concludes that Mr. Ku's suspension was not premised upon his academic record. Of course it is not clear that it was based upon a disciplinary action either since there is no indication that Mr. Ku violated any of the school's rules or regulations. The decision to place him on leave appears to have been grounded, at least in part, on concerns that he suffered from psychological problems. Under these circumstances, it would seem to the Court that due process would require some prior notice and opportunity to be heard, prior to any suspension, as well as an opportunity for a psychological evaluation before a final decision were to be reached.

The Court cannot say, as a matter of law, that the State is entitled to summary judgment on the plaintiff's due process claims. Rather, it must conclude, on the basis of the undisputed facts in the record, that Mr. Ku's due process rights were violated by the way the ETSU handled his suspension, even if ETSU had his best interests at heart.

In light of the fact that Mr. Ku has not sought, and is not entitled, to compensatory damages from the State, there is no remaining issue for trial. Mr. Ku seeks only injunctive relief, costs, and attorney fees. Trial of this case will be canceled and the Court will order injunctive relief.

An appropriate order will follow.

ENTER:

/s/ _____
THOMAS GRAY HULL
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

NO. 2:00-CV-10

[June 7, 2001]

TZE-PONG "RAYMOND" KU)
)
v.)
)
STATE OF TENNESSEE)
)

ORDER

Pursuant to a memorandum opinion this day passed to the Clerk for filing, the State of Tennessee's motion for summary judgment [Doc. 31] is **DENIED**. In light of the fact that the Court has found that Mr. Ku's procedural due process rights were violated by the way East Tennessee State handled his suspension from medical school, the Court hereby **ORDERS** that Mr. Ku be allowed to re-enter medical school; resume his junior year clerkships; and retry the USMLE Step 1 exam when he feels ready to do so, with the understanding that it must be passed before he can begin his fourth year curriculum.

In light of the foregoing, the final pretrial conference and the trial of this matter are **CANCELED**.

The Court will address the issue of attorney fees when and if Mr. Ku makes an application for this relief.

ENTER:

/s/ _____
THOMAS GRAY HULL
UNITED STATES DISTRICT JUDGE